IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1198

EDGAR D. WHITCOMB, Governor of the State of Indiana,
Appellant,

v.

PATRICK CHAVIS, ANDREW RAMSEY, MASON BRYANT, ROWLAND ALLEN, WILLIAM WALKER, JR., MARILYN HOTZ,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM AND APPELLEES' ALTERNATIVE MOTION TO ADVANCE

APPELLANT'S RESPONSE TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Appellees do not challenge the jurisdiction of this Court to hear this appeal as not taken in conformity to statute or to the Rules of this Court under Rule 16.1(a) of this Court. Appellees challenge this appeal solely on the grounds that it presents no substantial federal question.

Whether the lower court abused its discretion in adopting a single member districting plan is not the issue. The issue is whether the district court erred, as a matter of law, when, in view of the facts of this cause, it adopted a single member districting plan. Appellees would disengage the plan adopted by the district court from that court's determination in this cause that the Marion County multi-member district was unconstitutional. The lower court's single member districting plan is part and parcel of, and flows directly from, that court's determination that the Marion County multi-member district was unconstitutional. The single member districting plan adopted by the district court was the court's solution to a dilution of some votes which the court supposed to exist in the Marion County multi-member district. Viewed in this light, whether the lower court erred in adopting a single member district plan presents a substantial federal question.

Whether a court must order reapportionment whenever it finds state apportionment laws unconstitutional is not, as Appellees contend, the issue. The Indiana General Assembly constitutionally reapportioned the state legislature in 1965 with the approval of the same district court which acted in this cause. *Stout v. Bottorff*, 249 F. Supp. 488 (D.C. Ind. 1965). This Court has held a rational approach to reapportionment would require a state to reapportion constitutionally but once between each decennial census. *Reynolds v. Sims*, 377 U.S. 522, 583-584 (1964). Thus the question is whether a state should be required to constitutionally reapportion more than once between decennial censuses. This presents a substantial federal question.

Appellees do not take issue with Appellant's position that the 1960 census figures are out-moded and are no longer reliable in view of obvious and substantial changes

and shifts in population since 1960. In citing *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) and *Wells v. Rockefeller*, 394 U.S. 452 (1969), Appellee does no more than concede that the issue Appellant seeks to raise in this regard was simply not decided by those cases. Appellees' position would appear to be that an unconstitutionally constituted Legislature cannot constitutionally reapportion. If Appellees' position were taken to its logical conclusion, it would be necessary for the federal courts to reapportion whenever and wherever it found malapportionment. This Court has never prohibited a political subdivision of a state from reapportioning itself notwithstanding a finding that the political subdivision in question was malapportioned. Whether the 1960 census may serve as a sound basis for reapportionment in the waning days of the 60's is a substantial federal question.

APPELLANT'S RESPONSE TO APPELLEES' ALTERNATIVE EMERGENCY MOTION TO ADVANCE CASE AND TO SET EARLY DATES FOR FILING BRIEFS.

Contrary to Appellees' assertion, Appellant has caused no delay in this case. At all times, Appellant has acted within the time allowed by the statutes and the rules of this Court governing appeals to this Court. Appellant does not seek a delay now.

Appellees would have this Court advance the time for filing all briefs in this cause. However, an immediate determination would serve no interest of the parties to this cause for the reason that a determination by this Court at this time would place the parties in the same position they are now. The state constitutionally reapportioned in 1965. See *Stout v. Bottorff*, 249 F.Supp. 488 (D.C. Ind.

1965). And as this Court said in *Reynolds v. Sims*, 377 U.S. 533, 584 (1965), a state need only reapportion constitutionally once between every decennial census. Furthermore, reapportionment at this time could only be based on 1960 census data, the only census data presently available for the entire state. But as Appellant argued in its "Application for Stay" of January 29, 1970, the 1960 census data is unreliable and outdated and if used as a basis for reapportioning the state at this time would produce an unconscionable unconstitutional result. In any event, the 1970 census data will soon be available.

The issues in this cause are novel and significant. Appellees' theory, adopted by the district court, is ingenious, but erroneous. The ramifications of Appellees' theory have an immediate and far reaching impact. To fully brief, argue and decide this cause in haste removes the full measure of considered thought which this complex case requires.

Appellees present no sound compelling reason to this Court for advancing this cause. Appellees assert that Appellant agrees that ". . . [i]n view of the impending Indiana primary election, this case cannot wait decision in the normal course of the Court's docket. . . ." That Appellant agrees is a misrepresentation. Appellant has agreed to nothing. Appellees' reference to the forthcoming primary election is misleading. Appellees imply that ". . . the impending Indiana primary election . . ." is a significant date on the election calendar *for this cause.* This is simply not so. Under state law, the machinery of the fall election was irrevocably in motion on February 24, 1970. The district and precinct lines must be set on that date. Whatever districting plan is in effect on that date must of consequence be the plan for the fall election The Indiana primary election is merely a mile-marker along the way. The state has no legal means at its disposal at this time for

conducting the fall election under a plan of reapportionment other than the one in effect on February 24, 1970 (i.e. The Indiana Apportionment Act of 1965).

CONCLUSION

28 U.S.C. § 1253 authorizes this appeal. Appellant presents substantial federal questions in this appeal requiring plenary consideration, with briefs on the merits and oral argument for their resolution. Thus Appellees' Motion to Dismiss or Affirm should be denied.

Appellees present no sound compelling reason to this Court for advancing this cause. Thus, Appellees' Emergency Motion to advance this cause should be denied.

Respectfully submitted,

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